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No. 93-1841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, *et al,*
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African-Americans to secure their constitutional and civil rights by means of litigation. The Subcontracting Compensation Clause at issue in this case was adopted in part to

[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

encourage federal contractors to subcontract with firms owned by African-Americans who have been the victims of racial discrimination. Amicus has previously filed briefs with this Court, on behalf of parties or amici, in a wide variety of cases involving race-conscious affirmative action. We believe our views on the circumstances presented by this case may be of assistance to the Court.

SUMMARY OF ARGUMENT

The petitioner in this case seeks only prospective injunctive relief with regard to certain possible future applications of the Subcontracting Compensation Clause. In order to establish standing to obtain such injunctive relief, petitioner must demonstrate that it faces reasonably certain and immediate injury if the injunction is denied. *Lujan v. Defenders of Wildlife*, 504 U.S. ___ (1992); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). Petitioner faces no such imminent injury.

(1) Although the SCC has been in use since 1979, and petitioner has been in business since 1976, petitioner can point to only one contract which it allegedly ever lost because of the SCC.

(2) The SCC is utilized only in the relatively uncommon instances in which FHWA itself directly contracts for the construction of a highway. In 1990 the FHWA let in Colorado only one construction contract involving guardrail work, the particular work engaged in by petitioner.

(3) Not all such FHWA direct contracts contain an SCC.

(4) In some instances the SCC is of no practical importance because subcontracting with DBEs, which the

SCC merely encourages, is required by other contract provisions not challenged in this action.

(5) Petitioner can identify only six instances between 1976 and 1990 when it ever bid on any subcontracting work for an FHWA direct contract.

(6) Petitioner does not challenge all applications of the SCC. It raises no constitutional objection to the use of the SCC where the owners of a DBE are in fact disadvantaged, or where a firm qualified as a DBE solely because it was owned and managed by women. Petitioner challenges the constitutionality of the SCC only in those cases, if any, in which the SCC results in the award of a subcontract to a firm whose owners and managers are not disadvantaged, but qualified for DBE status solely because of the rebuttable presumption that minority owner operators of small firms were disadvantaged by past discrimination. Whether and when petitioner will be injured in the future by any such application of an SCC are too speculative to confer the requisite standing.

ARGUMENT

I. INTRODUCTION

Petitioner urges this Court to decide in this case fundamental constitutional issues of far-reaching importance regarding the ability of the Congress, and of federal executive agencies, to engage in any form of race-conscious action. Petitioner's brief sets forth an elaborately detailed formulation of constitutional principles which petitioner asks this Court to adopt. Noticeably absent from both the petition and that brief, however, is any account of how a decision by this Court on these complex issues would actually affect the petitioner itself.

In the proceedings below, the respondents directly challenged petitioner's standing to litigate the constitutional questions now presented to this Court.[2] The issue of standing must be addressed before the Court undertakes to consider the substantive constitutional questions raised by the briefs; in the absence of standing, this appeal would not present the "case or controversy" required by Article III, and the federal courts would lack subject matter jurisdiction. It is particularly important that standing problems be carefully assessed before resolving such substantive constitutional questions, since constitutional issues are to be decided on the merits only where clearly necessary.

Since the initial filing of the complaint in this action, both the litigation in the courts below and a substantial body of discovery have sharpened, clarified and ultimately limited the scope of petitioner's claim. In its current posture, petitioner's claim has been narrowed in three important respects.

First, although there are a variety of different federal programs regarding contracting and subcontracting, petitioner challenges only <u>one</u> -- the inclusion of Subcontract Compensation Clauses (SCC) in certain construction contracts executed by the Federal Highway Administration.[3] Petitioner is not here challenging set

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[2] Defendants' Motion for Summary Judgment, ¶2; Pet.App. 12-14.

[3] Petition for Writ of Certiorari, 1 ("On August 10, 1990, Adarand ... filed an action ... challenging the use ... of ... the 'Subcontracting Compensation Clause'"), 3 ("Adarand asserts that the SCC program ... violates the right of equal protection ..."); Pet.Br. 7 (SCC is "the ... mechanism that is at issue in this case"), 11 (action challenges "the constitutionality of the use ... of the contract provision referred to as the SCC.")

asides or other practices by state highway agencies engaged in federally assisted construction projects. As a practical matter, the vast majority of federal highway funds are disbursed to the states in the form of grants, and the states themselves in turn contract for the building of roads; these state contracts, although federally funded, do not include any SCC. Of all federal funds utilized for highway construction, only two percent are expended directly by the Federal Highway Administration, rather than being funnelled through the states.[4] Even among the limited number of federal highway contracts entered into directly by the FHWA, not all include an SCC.[5]

Second, petitioner does not object to <u>all</u> applications of the Subcontracting Compensation Clause. The SCC provides compensation for federal highway contractors who subcontract with Disadvantaged Business Enterprises (DBEs). Petitioner does not and could contend that a race-neutral policy of assisting socially and economically disadvantaged individuals raises any constitutional question. Petitioner thus does not attack the utilization of a SCC where the owners and managers of a DBE are white.

Petitioner's brief at a number of points obscures the nature of the issue by describing the case as "a challenge to a federal program, ... 'the Federal Construction Procurement Program,' authorized by §502 of the Small Business Act." Pet.Br. 5; see *id.* at 44-46, 49. Petitioner's conclusion urges the Court to declare the Federal Construction Procurement Program unconstitutional. *Id.* at 50. But the only specific action taken under that program to which petitioner objects is the SCC. *Id.* at 7.

[4] For each fiscal year from 1988 through 1992, federal highway construction spending totaled $7.35 billion. Expenditures by FHWA on forest highways, the type of construction involved in the West Dolores project, were only $55 million annually. 101 Stat. 144-45.

[5] See part III, *infra*.

Under the terms of the regulations incorporated in the SCC, moveover, any firm owned and managed by women is treated as a DBE,[6] whether the women are white or otherwise. The number of white women in the United States is of course substantially larger than the total number of racial minorities. Petitioner does not challenge the constitutionality of this gender-based criterion.[7] Petitioner's

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[6] The SCC provision of FHA contracts, section 108.01, states in pertinent part that "a DBE shall mean a small business owned and controlled by socially and economically disadvantaged individuals ... or a woman owned business as defined under FAR Contract Clause 52.219-13." Answer, Exhibit C, p. I-24; J.App. 24. The referenced provision of the FAR Contract states:

> " 'Woman-owned small business' ... means small business concerns that are at least 51 percent owned by women who are United States citizens and who also control and operate the business."

Answer, Exhibit B, p. F-16; 48 C.F.R. 52.219-13. The treatment of women-owned and operated firms under the SCC is thus significantly different than the treatment of minority owned and operated firms. All women-owned small business are classified as DBEs, whereas minority owners are only accorded a rebuttable presumption of disadvantage. J.App. 24.

Although petitioner systematically avoids expressly mentioning this provision, which applies to both white as well as minority women, it carefully states that there is no presumptive classification as a DBE for firms "owned or operated by white men." Pet.Br.9 (emphasis added).

[7] The questions presented by the petition all deal exclusively with the "race-based" aspect of the SCC. Petition, p.i; see also Pet.App. 14 ("Both parties ... proceeded before the district court on the apparently shared assumption that the instant controversy concerned only the racial preference aspect of the SCC program. Because Adarand never argued the point in its motion for summary judgment, the district court was never afforded an opportunity to evaluate the merits of the WBE .... Moreover, Adarand did not press this point during arguments before us .... For these reasons, we limit our review only to the constitutionality of the SCC program's

sole constitutional objection is to the fact that, in determining whether a male-owned or managed firm is disadvantaged by past discrimination, officials apply a rebuttable presumption that members of racial minorities were so disadvantaged.

Third, the relief sought by petitioner is expressly limited to the utilization of SCCs in future federal contracts. The instant litigation was apparently triggered by the rejection in 1989 of petitioner's bid to supply guardrails for a highway project known as the West Dolores Project. Petitioner alleged that the guardrail subcontract was given instead to a DBE which had submitted a bid higher than that of the petitioner. Petitioner's 1990 complaint, however, did not ask that petitioner be awarded the disputed subcontract, or request damages or any other form of monetary relief in connection with the West Dolores Project.[8] Perhaps coincidentally, the complaint did not allege that the particular DBE which won the guardrail contract for the West Dolores Project had qualified as a DBE because of the disputed minority-disadvantage presumption, or even that that DBE was minority-owned.

Because the complaint seeks solely prospective injunctive relief, petitioner has standing only if it faces a real and reasonably immediate injury if use of the disputed minority- disadvantage presumption is not enjoined. The record makes clear that that is not the case. Although

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racial preference."). Petitioner's brief in this Court contains no reference to the rule regarding businesses owned and managed by women.

[8] J. App. 22-23. Neither the Statement of the Facts in the petition, pp. 4-6, nor the Statement of the Case in petitioner's brief, pp. 5-18, mentions this limitation on the relief requested.

petitioner has been in business since 1976,[9] and the SCC has been in use since 1979,[10] petitioner has been able to identify only one instance -- the West Dolores Project -- in which petitioner assertedly lost a contract because of the SCC.[11] As we set out in part III, *infra*, whether the minority-disadvantage presumption will again affect petitioner in the future, least of all in the near future, is utterly speculative.

II. PETITIONER LACKS STANDING TO SEEK DECLARATORY OR PROSPECTIVE INJUNCTIVE RELIEF UNLESS IT CAN DEMONSTRATE A SUBSTANTIAL RISK OF REASONABLY IMMINENT INJURY FROM THE PRACTICE WHICH IT SEEKS TO ENJOIN

This Court has repeatedly held that a plaintiff cannot establish standing to seek declaratory or prospective injunctive relief merely by proving that he or she has been

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[9] Pet. Br. 7 ("Adarand has engaged continuously in this business since 1976.").

[10] Pet. App. 6 ("The SCC program was implemented in 1979....").

[11] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1.

An official of Adarand suggested that because of the SCC the firm had also lost a subcontract to a DBE in connection with a highway construction project at McClure Pass. Deposition of Steven Goeglein, p. 21. Adarand's own records revealed, however, that the guardrail subcontract on the McClure Pass project was actually won by a non-DBE firm which underbid Adarand. Plaintiff's Answers to Defendant's Interrogatories, Attachment 3, Project FH 15-1; *id.*, Attachment 1, Project FH 15-1; Defendants' Responses to Plaintiff's Requests for Production of Documents, "CFHLD Project with Guardrail," Project FH 15-1.

injured in the past by a challenged practice. Unless such a plaintiff also faces injury in the proximate future from a repetition of that practice, he or she would lack a substantial stake in whether continued use of the practice is enjoined. Absent such an impending injury, issuance of the injunction would confer no palpable benefit on the plaintiff, and would provide no redress for any imminent harm.

The Court has on repeated occasions invoked this aspect of standing jurisprudence to deny declaratory or prospective injunctive relief. In *Golden v. Zwickler*, 394 U.S. 103 (1969), the plaintiff, a former member of Congress, had been convicted under a New York law forbidding the circulation of anonymous political pamphlets; he sued for a declaratory judgment that the statute was unconstitutional. Although the plaintiff alleged that he intended to distribute similar leaflets in subsequent elections, 394 U.S. at 106, this Court concluded that the plaintiff lacked standing to seek such relief because there was not a "real [or] immediate" prospect that the plaintiff would run for office again in the near future, and thus it was "wholly conjectural that another occasion might arise" when the plaintiff might again be prosecuted. 394 U.S. at 109.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the plaintiffs claimed that they had been subjected to unreasonably high bail and unusually harsh sentences as part of a scheme of intentional racial discrimination on the part of police and judicial officials. In *O'Shea*, as here, the plaintiffs sought no damages as a result of past actions, but requested purely prospective relief. In holding that the plaintiffs lacked standing to seek such relief, the Court insisted that the "threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical'." 414 U.S. at 494. The plaintiffs had "not pointed to any imminent prosecutions contemplated against any of their number." 414 U.S. at 498.

> Apparently, the proposition is that *if* [plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before [defendants], they will be subjected to the discriminatory practices that [the defendants] are alleged to have followed.

414 U.S. at 497 (Emphasis in original). The Court concluded that such a possible injury was simply too "conjectural" to support standing. 414 U.S at 502; see *id.* (equitable relief requires "the likelihood of substantial and immediate irreparable injury").

The complaint in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), sought a declaratory judgment holding unconstitutional a state law that authorized the use of deadly force against non-dangerous fleeing suspects. See *Garner v. Tennessee*, 471 U.S. 1 (1985). The plaintiff, the father of an 18 year old who had been killed by the police, asserted that he had a second son who was also at risk. The complaint alleged that:

> if ever arrested or brought under an attempt at arrest on suspicion of a felony, [the surviving son] *might* flee or give the appearance of fleeing, and would therefore be in *danger* of being killed....

431 U.S. at 172 n. 2 (Emphasis by Court). The Court dismissed the case for failure to present a case or controversy, reasoning that "[s]uch speculation is insufficient to establish the existence of a present, live controversy." *Id.*

In *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiff had allegedly been the victim of unconstitutionally excessive force in the form of a chokehold then utilized by

the Los Angeles Police Department. Although acknowledging that Lyons could maintain an action for damages, the Court dismissed for lack of standing the count of Lyons' complaint that sought injunctive relief. The Court reasoned that Lyons would have had standing to seek such prospective relief only if he could demonstrate the existence of an "immediate," 461 U.S. at 105, 107, 110-11, and "realistic threat," 461 U.S. at 106 n. 7, that he would again be subject to such abuse by the police. The Court emphasized that no further such incidents had occurred in the five months following the only known occasion on which Lyons had been assaulted. 461 U.S. at 108.

Whitmore v. Arkansas, 495 U.S. 149 (1990), noted that the Court's earlier decisions demonstrated

> what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be "'certainly impending'" to constitute injury in fact.

495 U.S. at 158. That requirement could not be satisfied in *Whitmore* by "speculation and conjecture" that appellate review of the conviction and death sentence that had been imposed on one defendant might provide information helpful to another capital defendant. *Id.*

This Court most recently applied these principles in *Lujan v. Defenders of Wildlife*, 504 U.S. ____, 119 L. Ed. 2d 351 (1992). The plaintiffs in that case sought to enjoin certain actions by the Secretary of the Interior which they alleged would imperil the Nile crocodile in Egypt and the Asian Elephant in Sri Lanka. The plaintiff organization based its claim of standing on affidavits from two members, both residents of the United States, who stated that they

respectively had visited in the past, and intended to return in the future to Egypt and Sri Lanka to observe the allegedly imperiled animals. This Court held that those affidavits were insufficient to establish the plaintiffs' standing to seek injunctive relief:

> [T]hese affidavits ... plainly contain no facts ... showing how damage to the species will produce "imminent" injury to [the affiants] ... "'[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief....'" ....[T]he affiants' profession of an "inten[t]" to return to the places they had visited before -- where they will presumably ... be deprived of the opportunity to observe animals of the endangered species -- is simply not enough. Such "some day" intentions -- without ... any specification of <u>when</u> the some day will be -- do not support a finding of the actual or imminent injury that our cases require.

119 L. Ed. 2d at 367[12] (Emphasis in original). The Court stressed that a plaintiff's burden is particularly heavy if the likelihood of injury "depends on the unfettered choices

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[12] See *id*. at 367 n. 2:

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes -- that the injury is '<u>certainly</u> impending ....' ... It has been stretched beyond the breaking point where, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." (Emphasis in original).

made by independent actors not before the courts," 119 L. Ed. 2d at 365, or turns on circumstances "at least partly within the plaintiff's own control." 119 L. Ed. 2d at 367 n. 2. Both of those complicating considerations are present in the instant case.

The circumstances of this case, as set out below, are readily distinguishable from those in *Northeastern Florida Chapter of AGC v. City of Jacksonville*, 124 L. Ed.2d 586 (1993). First, the plaintiff in *Northeastern* was an association of 240 contractors and subcontractors;[13] counsel for the plaintiffs there conceded that the standing question would have been very different if he had represented only a single firm.[14] Second, the plaintiffs in *Northeastern* alleged that they "regularly bid on"[15] the contracts actually affected by the disputed set-aside; here petitioner had bid on only one such subcontract in eleven years. Third, the ordinance at issue in *Northeastern* applied to *all* purchases made by the City of Jacksonville; here the SCC is found on average in less than one contract per year per state, and in many of even those limited instances the SCC is for practical reasons devoid of operational significance. Fourth, the set-aside provision in *Northeastern* precluded non-MBE firms from even bidding on many contracts. The SCC has no such effect; petitioner in fact bid for the subcontract in the disputed West Dolores Project.[16] Petitioner's claim is not

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[13] Northeastern Florida Chapter of AGC v. City of Jacksonville, No. 91-1721, Joint Appendix, p.10.

[14] Transcript of Oral Argument, Feb. 22, 1993, p. 13.

[15] *Northeastern*, J. App. 18, 124 L. Ed.2d at 593.

[16] Petitioner concedes that the only instance in which it decided not to bid on a contract because of a set-aside involved a <u>state</u> contract. Deposition of Steven Goeglein, p. 14-15.

that it is barred from bidding, but that, at some remote point in the future, it may "not win," a claim analogous to that of the unsuccessful plaintiffs in *Warth v. Seldin*, 422 U.S. 490 (1975). See *Northeastern*, 124 L. Ed.2d at 598.

Finally, this case, unlike *Northeastern*, is largely concerned with the actions of agencies and individuals who simply are not before the Court. See *Lujan v. Defenders of Wildlife*, 119 L. Ed.2d at 365. Petitioner objects not to the SCC incentive for subcontracting with DBEs, but to the manner in which the list of eligible DBEs is complied. The list of eligible DBE's, however, is prepared not by the FHWA or any other respondent, but by Colorado state officials.[17] The particular manner and extent to which Colorado officials in practice rely on the minority-disadvantage presumption is entirely unclear, and cannot readily be litigated in the instant case. See *General Bldg. Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982). In addition, what impact if any an SCC may have on petitioner will depend on the independent actions of future general contractors, who are free to disregard the SCC incentive where it exists, and to prefer a DBE bidder even if no SCC is applicable. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

III. PETITIONER FACES NO REAL AND IMMINENT INJURY BY REASON OF THE MINORITY - DISADVANTAGE PRESUMPTION

Whether in any given case a plaintiff faces a real and imminent injury by reason of a challenged practice is necessarily a fact-specific question. In the instant case petitioner has been able to identify only one instance since 1979 in which it lost a contract because of the SCC, and

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[17] Deposition of James L. Robinson, p. 107.

even here there is no express claim that the DBE which won the West Dolores subcontract had obtained DBE status because of the minority-disadvantage presumption. The record in the instant case makes clear why the SCC has had only this single isolated impact on petitioner, and why a recurrence, while not impossible, is far from sufficiently certain to provide petitioner with standing.

(1) The threshold problem is that there are relatively few construction projects which are contracted for directly by FHWA. In 1989 and again in 1990, FHWA awarded in the entire state of Colorado only a single direct bid contract involving guardrail subcontracting.[18] The annual FHWA expenditure for forest highway projects is only $55 million. (Pet. App. 7 n.4). The West Dolores Project, typical in size for the FHWA,[19] totalled more than $1 million; at that rate the FHWA could fund fewer than fifty contracts annually, approximately one contract per state per year. Not all of these highway projects will involve subcontracted guardrail work; in those cases in which it is competent to do so, the general contractor ordinarily builds the guardrails itself.[20] The record reveals that during the eight year period from 1983 to 1990, inclusive, the FHWA office in the instant case, which is responsible for

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[18] Defendants' Responses to Plaintiff's Requests for Production of Documents, Attachment "CFLHD Projects with Guardrail", Projects FH 60-2(2) and FH 59-3(3).

[19] "Direct Federal Program FY 1983 Estimate of MBE/WBE/SBC Procurements" (Average contract of $1 million).

[20] Deposition of Randy Pech, p. 19. In approximately 20% of all FHA construction projects no guardrail work is subcontracted. Defendants' Answers to Plaintiff's Interrogatories, p. 1 (no guardrail work subcontracted in 14 of 78 projects).

thirteen states,[21] had a total of only sixty-four direct bid contracts in which guardrail work was subcontracted,[22] an average of less than one such subcontract per year per state. Petitioner ordinarily bids only on projects in Colorado[23], and its business consists almost exclusively of guardrail work.[24] As a practical matter, all but a small fraction of Adarand's work is on state and city rather than federal contracts.[25] During a single year FHWA does fund several hundred state-managed highway construction projects in Colorado[26], but none of these are subject to an SCC.

(2) Even in those isolated instances in which the FHWA does issue a direct contract in Colorado, the terms of the contract would have no impact on petitioner unless petitioner actually bids for the guardrail subcontracting work. Petitioner concedes that it does not ordinarily bid on certain types of guardrail projects where "we don't feel like we are totally qualified on it."[27]

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[21] Pet.App. 9 n.7.

[22] Defendants' Answers to Plaintiff's Interrogatories, p.9.

[23] Deposition of Randy Pech, p. 22.

[24] *Id.* at 26, 27.

[25] *Id.* at 14-18.

[26] Defendants' Responses to Plaintiff's Requests for Production of Documents, Attachment "FY 1988 Twelve Month Report of Federal-Aid."

[27] Deposition of Randy Pech, pp. 13-14 (distinguishing Type 3, guardrail in which Adarand "specialize[s]", from Type 4 guardrail); Deposition of Steve Goeglein, p. 9 (Adarand bids on Type 3 guardrail).

Petitioner can identify only six instances from 1976 through 1990 in which it actually bid on an FHWA contract.[28]

(3) Not every direct-bid contract let by FHWA contains an SCC. In some instances, pursuant to section 8(a) of the Small Business Act, a contract is awarded to a DBE general contractor.[29] In such cases the general contract contains no subcontracting compensation clause, and the general contractor has no financial incentive to award guardrail or any other subcontracts to a DBE. As a practical matter, most DBEs who work on FHWA direct bid contracts do so as general contractors, pursuant to section 8(a), the validity of which petitioner does not here challenge.[30] On the one occasion in which it bid for the guardrail subcontract work for a section 8(a) contract, Adarand won the subcontract.[31] The SCC is also omitted from certain non-section 8(a) contracts.[32] Petitioner can identify only one contract on which it ever

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[28] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1. At least one of these was a section 8(a) contract, which contains no SCC. See part III (3), *infra.*

[29] "[T]he [SCC] clause is . . . not included in the 8(a) contracts. . . ." Petitioner's Brief, p. 6 n.3; Deposition of Craig Actis, p. 14.

[30] Deposition of James L. Robinson, pp. 39, 57-58, 67. Petitioner has never sought to serve as the general contractor on any FHA direct-bid project. Deposition of Randy Pech, pp. 17-18.

[31] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Project WYFH 11-1(3).

[32] Deposition of James L. Robinson, pp. 39, 57-58, 67.

bid which actually contained an SCC -- the West Dolores project.[33]

(4) In other instances, although a contract does contain an SCC, the compensation provided by the SCC is of no practical significance because the general contractor is required by other contact terms to submit and adhere to a specific plan for subcontracting with DBEs. Whenever a large general contractor receives a direct-construction contract worth in excess of $1 million, the FHWA requires that contractor to submit an acceptable written "subcontracting plan"[34]. "The subcontracting plan must specify the "[t]otal dollars to be subcontracted to small disadvantaged business concerns" and provide for certain specified assistance to such DBEs.[35] In the case of the West Dolores Project, the general contractor was too small to be subject to this "subcontracting plan" requirement;[36] the SCC was thus of operational significance. But a larger contractor with a subcontracting plan would be under an independent obligation to subcontract to DBEs the amount of work specified in its subcontracting plan, and thus would not ordinarily be affected by the deletion or modification of

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[33] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1.

[34] 48 C.F.R. § 19.704; 15 U.S.C. § 637 (c)(6); Answer, Exhibit A, p. 1; *id.*, Exhibit B, pp. F-13 to F-16; Deposition of James L. Robinson, p. 79. The form for submitting such plans is reproduced as an attachment to Defendants' Responses to Plaintiff's Requests for Production of Documents, "Subcontracting Plan Submitted In Accordance With Public Law 95-507."

[35] Answer, Exhibit B, pp. F-13, F-16.

[36] Deposition of James L. Robinson, p. 77, 91.

the SCC.[37] Petitioner is not challenging in this appeal the subcontracting plan requirement.

(5) Even in the case of a contractor whose contract contains an SCC but no subcontracting plan, the SCC at times will have no actual impact on the contractor's behavior. The compensation provided by the SCC is not contingent on the contractor extending any special bidding preference to a DBE; if lowest bidder for a subcontract of the requisite size happens to be a DBE, the contractor receives the specified additional payment, even though the contractor would have awarded the subcontract to the low-bidding DBE regardless of the SCC. The record in this case reveals that this does occur.[38] If the low bidder on a non-guardrail subcontract were already a DBE, the SCC would provide the general contractor no incentive to favor a higher bidding DBE over petitioner in awarding a guardrail subcontract.

(6) Even where there is no such DBE low bidder, it is far from certain that the SCC will affect the award of a guardrail subcontract. A general contractor might chose to qualify for compensation under the SCC by seeking a DBE for some form of subcontracting work

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[37] The Court of Appeals described the SCC as a provision "included in small-value contracts or where the prime contractor is a small business." Pet. App. 6. The record indicates the SCC is also included in large contracts with large business, but in those cases the SCC is of no operational significance.

[38] Deposition of Steven Goeglein, p. 15; Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Project FH 59-3(3) (Adarand underbid by DBE); Project FH 60-1(1) (Adarand underbid by DBE).

other than guardrail construction. In addition, the SCC provides only an additional payment equal to 1.5 to 2% of the contract; thus if the cost of training and assisting a DBE, plus any difference between the bid of the DBE and the lowest non-DBE bid, exceeds the proffered compensation, the general contractor will lose money by contracting with the DBE, and presumably will refuse to do so. Even where the DBE's bid is close enough to the non-DBE bid for the SCC to avoid such a loss, general contractors may nonetheless decide to contract with the non-DBE firms for a variety of reasons, such as prior business relationships.[39] For whatever combination of reasons, many FHWA general contractors whose contracts include an SCC in fact do chose not to subcontract with DBE firms[40]; for the years 1982-85 only about 60% of such general contractors subcontracted with *any* DBE's.[41] Of the three non-section 8(a) subcontracts bid on by petitioner for which a non-DBE firm was the low bidder, the low bidding non-DBE firm actually won two of the subcontracts.[42]

(7) Even in the uncertain event that petitioner bids on a subcontract which is awarded to a DBE because of the SCC, an injunction modifying the way firms are

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[39] Deposition of Craig Actis, pp. 24, 26.

[40] Deposition of James L. Robinson, p. 90.

[41] Evaluation of Direct Federal DBE Subcontracting Compensation Clause, Fiscal Years 1982, 1983, 1984, 1985, Appendix D (72 of 182 general contractors receive no compensation under SCC; 70 of 182 general contractors had *no* subcontracts with DBE's.)

[42] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Projects FH 60-2(2), FH 20-1(1) FH 15-1(10).

designated as DBEs could have no impact on petitioner unless Adarand were itself the lowest bidder on the project.

(8) Even when and if petitioner were to face loss of a contract because of the SCC, the injunctive relief sought in this case might still confer no benefit on petitioner. Petitioner attacks only the use of the minority-disadvantage presumption. An injunction against utilization of that presumption would afford petitioner no benefit if the next DBE to which it loses a subcontract by virtue of the SCC is owned and managed by whites, by women, or even by minorities, if those minorities were able to demonstrate, without the assistance of the challenged presumption, that they were in fact socially and economically disadvantaged.

In light of all these circumstances, it is readily understandable why petitioner can point to only a single case between 1979 and 1990 in which it allegedly lost a subcontract because of the SCC. Obviously, the possibility that petitioner will lose one contract every eleven years falls far short of imminent injury.

IV. RESOLUTION OF PETITIONER'S CHALLENGE TO THE MINORITY-DISADVANTAGE PRESUMPTION WOULD BE PREMATURE

Dismissal of the instant action for lack of standing will not, of course, leave petitioner without a remedy if at some point in the future it actually faces loss of a subcontract because of the disputed minority-disadvantage presumption. Should that occur, petitioner itself acknowledges, it is entitled to seek to persuade officials that, despite the presumption, the minority-owned firm competing with it does not in fact qualify for DBE status. If faced with

the imminent loss of a subcontract because of the minority-disadvantage presumption, petitioner could at that point seek injunctive relief against the officials preparing the DBE list, against federal officials to enjoin payment under the terms of the SCC, or against the general contractor for an order awarding petitioner the disputed contract. Petitioner might in at least some circumstances have an action for damages.

The merits of petitioner's challenge to the minority-disadvantage presumption necessarily turns to some degree on circumstances which may be quite different today than they will be if and when petitioner actually faces at some point in the future an immediate likelihood of being affected by that presumption. In the instant appeal, for example, the parties are in dispute regarding the adequacy of congressional findings (Pet. Br. 34-39, 42-43), the sufficiency of the information on which the FHWA relied in adopting the SCC (Pet. Br. i, 48), and the adequacy of the evidence "in the record" in this case to justify the minority-disadvantage presumption. (Pet. Br. 34). All of these circumstances are likely to be different in the future than they were when the instant case arose in 1989.

Similarly, the outcome of any constitutional challenge to the minority-disadvantage presumption may conceivably turn on the manner and frequency with which the presumption is utilized, the responses of officials to challenges to the DBE status of minority firms, or the actual availability of DBE status to non-minority firms. At this juncture in the instant case the record is silent on all of these questions. But it is clear that the method of selecting firms advantaged by the SCC has changed substantially since

1979 [43], and there is no reason to believe that it will not change again in the future.

Finally, the status of petitioner itself under the SCC will not necessarily remain the same as it is today. Under current practice all firms owned and operated by women are treated as DBEs. In the instant case, ninety percent of Adarand stock is concededly owned by women.[44] In addition, Adarand's President is a woman. [45] Petitioner asserts that at this point in time it is ineligible for DBE status as a female-owned and operated firm because Adarand's general manager is a man.[46] Assuming,

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[43] At one time the SCC was expressly limited to minority owned firms. See "Evaluation of Direct Federal's MBE subcontracting Compensation Clause - Consolidated Report - January 1982," p. 1 (clause applies to "minority business enterprise[s]"). In 1983 this standard was replaced the DBE system, which permits inclusion of white-owned firms and accords to minority owned firms only a rebuttable presumption of disadvantage. Pet. App. 7 n.4; Female owned firms were included as DBEs in 1987. Defendants' Answers to Plaintiff's Interrogatories, p. 10.

[44] Deposition of Randy Pech, pp. 11-12; deposition of Steven Goeglein, p.8; Pet. App 10 n. 8.

[45] Deposition of Randy Pech, p.12; see *id.* at 35 (female president "authorizes payments of bills. She is responsible for the contracts to make sure they are written not to hurt us. She reviews the contracts and signs them and makes the additions or deletions to the contracts as needed....She makes sure the unit prices are correct and makes sure they don't have a clause in there that is unrealistic to us...."); J. App. 32 (woman president since 1988); Plaintiff's Answers to Defendants' Interrogatories, p. 3 (woman president).

[46] Pet. Br. p.7 ("Adarand is not eligible for a presumption... because its 'management and daily business operations are controlled by'... a white male"); see deposition of Randy Pech, p.5 (describing position as "[g]eneral manager"). Pech owns no stock in Adarand.

arguendo, that that circumstance would preclude petitioner from invoking the gender-based classification as a DBE,[47] it is entirely possible that Adarand's stockholders and president may in the future decide to name a woman as general manager. Manifestly the legal issues presented would be very different if petitioner, having itself been placed on the DBE list by virtue of the gender-based rule, were then to challenge use of the mere presumption of disadvantage accorded minority owned and managed firms.

It is, of course, impossible to foresee the extent to which these or other possibly significant developments might transpire between now and the date, if any, on which petitioner actually faces loss of a subcontract by reason of the minority-disadvantage presumption. Even if some form of injunction relief were awarded in the instant case, however, it would be subject to modification if such changes were to occur in the interim.

Id. at 10 ("Q. What portion of Adarand do you own now? A. None.").

[47] The employment of a man as general manager would not necessarily preclude classification of Adarand as a woman-owned business. FAR Contract Clause 52.219-13 requires only that women "exercis[e] the power to make policy decisions" and are "actively involved in the day-to-day management of the business." Answer, Exhibit B, p. F-16. On the other hand, a firm which is in reality owned and operated by a non-disadvantaged man could not qualify as a DBE merely by conferring purely nominal ownership and job titles on women or disadvantaged individuals.

CONCLUSION

For the above reasons, the decision of the court of appeals should be vacated, and the case remanded with instructions that it be dismissed for lack of jurisdiction.

Respectfully submitted,

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